

Supreme Court of New York
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1653

THEODORE Q. CHILDS,

Petitioner,

- against -

LUCY GANT CHILDS,

Respondent.

On Petition for a Writ of Certiorari
to the Appellate Division of the
Supreme Court of the State of New
York, Second Judicial Department.

BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent opposes the petition for a writ of certiorari to review the order of the Court of Appeals of the State of New York entered on February 22, 1978 (A. 11).

QUESTIONS PRESENTED

1. Is the order, review of which is here sought, final within the meaning of 28 U.S.C. § 1257 where petitioner never sought leave to appeal to the New York Court of Appeals?

2. Does petitioner, who never applied for an award of counsel fees, have standing to challenge the constitutionality of Section 237 of the New York Domestic Relations Law, a challenge not raised before the trial court?

STATEMENT OF THE CASE

Petitioner here seeks review of an order entered on December 30, 1975 (A. 14) in resolution of a proceeding in which petitioner sought modification of the custody provisions of a New York decree (A. 14

et seq.). That order, inter alia, granted in part respondent's application for an award of counsel fees and disbursements, directing respondent to pay \$12,000 in counsel fees and \$1,500 in disbursements to his former wife (A. 26). The trial court specifically held that in making such award it was apportioning responsibility for the fees and costs between the parties, and requiring respondent to "share" in such responsibility, based, among other things, upon the parties' respective financial circumstances as presented to the Court in oral testimony (A. 26-7).*

* The trial court also based its award upon: "[T]he extensive legal services rendered by able counsel for the plaintiff [here, respondent]" (A. 26). The Court recited that it was "[P]rivy to the 'day to day' services rendered during the protracted Hearing [in excess of twenty days] conducted herein." (A. 26). See also, A. 17-18.

That testimony did not include any of the "facts" set forth in the Petition at page 3 (Statement of the Case, second paragraph), but did reveal that respondent's income, inclusive of alimony due but unpaid by petitioner, was less than \$12,000 in 1975.

Petitioner appealed from the award of counsel fee and disbursements to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, there raising for the first time the claim that Section 237 of the New York Domestic Relations Law is unconstitutional (A. 14-28). That court reduced the award of counsel fees to \$5,000 (A. 13), but declined to rule upon the constitutional challenge, ruling that petitioner:

"[H]aving failed to request a counsel fee, lacks the requisite standing to challenge the constitutionality of the statute." (A. 13).

Petitioner sought to appeal that order of right to the New York Court of Appeals, pursuant to New York Civil Practice Law and Rules § 5601 ("C.P.L.R."). That appeal was dismissed for want of a substantial constitutional question (A. 11). Petitioner never thereafter sought leave to appeal to that court, pursuant to C.P.L.R. § 5602.

REASONS FOR DENYING THE PETITION
FOR CERTIORARI

I.

THE ORDER, REVIEW OF WHICH IS
SOUGHT, WAS NOT FINAL AND THERE-
FORE THIS COURT IS WITHOUT JU-
RISDICTION.

Petitioner might have sought review of the order of the Appellate Division under C.P.L.R. § 5602(a)(1), following dismissal of his appeal of right. C.P.L.R. § 5514(a). Petitioner having failed to do so, the petition should be denied, as this Court is without jurisdiction. Matthews v. Huwe, 269 U.S. 262 (1925); Hammerstein v. Superior Court, 341 U.S. 491 (1951).

II.

PETITIONER LACKS STANDING TO CHALLENGE THE STATUTE

Petitioner argues that New York Domestic Relations Law, Section 237(b) ("D.R.L. § 237(b)") unconstitutionally discriminates on the basis of sex because denying men the right to be awarded counsel fees in appropriate cases. Petitioner never applied for such fees to the trial

court (A. 17) and therefore is without standing to urge the alleged infirmity of the statute.*

Petitioner has demonstrated no "personal stake in the outcome of the controversy" Baker v. Carr, 369 U.S. 186, 204 (1962). Petitioner has not been injured by the operation of D.R.L. § 237(b). Barrows v. Jackson, 346 U.S. 249 (1953). Petitioner cannot here state that the statute may be impermissibly discriminatory as to some third person. Id.

This Court has consistently declined

* Petitioner's claim that he "did not apply for an award to him of counsel fees since no such award was authorized under the applicable statute" (Petition, p. 3) is an afterthought, unsupported by the record.

to consider constitutional attacks presented by persons not directly injured by the challenged provisions, see, McGowan v. State of Maryland, 366 U.S. 427, 429 (1961), and should not deviate from such practice here, particularly as petitioner never timely raised this issue before the state trial court.* See, Youakim v. Miller, 425 U.S. 231, 234 (1976).

* Had the issue been timely raised the state court might well have interpreted D.R.L. § 237(b) in such manner as to remove all doubts as to its propriety. Harrison v. National Association for the Advancement of Colored People, 360 U.S. 167 (1959). The New York courts have done so recently in related areas. See, Carter v. Carter, 58 App. Div. 2d 438, 397 N.Y.S.2d 88 (2nd Dept. 1977).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 13, 1978